United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

810

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,717

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 18 1970

Nathan J. Paulson
CLERK

EDWARD T. CARTER

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEWIS A. RIVLIN
(Attorney for Appellant
appointed by Order of
this Court)
Peabody, Rivlin, Kelly,
Cladouhos & Lambert
Suite 707
1730 M Street, N.W.
Washington, DC 20036
(202) 296-7202

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

Statutues:

*Cases or authorities chiefly relied on are marked by asteriks.

QUESTIONS PRESENTED

I. WAS IT ERROR FOR THE TRIAL COURT TO DENY THE MOTION FOR A DIRECTED VERDICT ON THE CHARGE OF ASSAULT WITH INTENT TO COMMIT RAPE WHEN THE GOVERNMENT HAD FAILED TO OFFER ANY EVIDENCE GOING TO PROVE AN ESSENTIAL ELEMENT OF THAT OFFENSE?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ALLOWING THE GOVERNMENT TO IMPEACH APPELLANT'S CREDIBILITY BY OFFERING INFORMATION OF A PRIOR CONVICTION WHEN THE PREJUDICE TO APPELLANT RESULTING THEREFROM CLEARLY OUTWEIGHED ANY BENEFIT THE GOVERNMENT MIGHT HAVE DERIVED THEREFROM IN IMPEACHING APPELLANT'S CREDIBILITY?

III. WAS IT ERROR FOR THE TRIAL COURT TO REFUSE TO AMPLIFY OR CHANGE IN ANY WAY ITS CHARGE ON ASSAULT WITH INTENT TO COMMIT RAPE WHEN AN ESSENTIAL ELEMENT WAS OMITTED THEREFROM?

IV. WAS IT ERROR FOR THE TRIAL COURT TO REFUSE TO GRANT THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHEN THE EVIDENCE WAS CLEARLY INSUFFICIENT TO SUPPORT THE VERDICT?

(THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS HONORABLE COURT)

REFERENCES TO RULINGS

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 23,717

EDWARD T. CARTER,

APPELLANT

v.

UNITED STATES OF AMERICA,

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

At approximately 5:30 a.m. on the morning of August 23, 1968, a man entered the bedroom of Thomasine Lewis by removing the screen from the window and crawling through. Once inside the apartment, the man committed certain acts which allegedly constitute assault with intent to commit rape. When Mrs. Lewis and a sister who was present in the

apartment started to scream, the man fled.

On October 1, 1968, nearly six weeks after the man entered her apartment, Mrs. Lewis saw appellant outside a Safeway store and had him arrested by a passing officer. After a preliminary hearing, which was held on October 9, 1968, appellant was indicted by the Grand Jury on two counts, one charging him with burglary in the first degree (22 D.C. Code §1801(a) (Supp. III, 1970) and the other with assault with intent to commit rape (22 D.C. Code §501 (Supp. III, 1970).)

Following trial before Judge Hart and a jury on August 25 and 26, 1969, appellant was found guilty on both counts and was sentenced to ten to thirty (10-30) years on count one and five to fifteen (5-15) years on count two.

Appellant was granted permission to appeal to this Court in forma pauperis, but his motion for release on personal bond pending appeal was denied, and he has been incarcerated since his arrest on October 1, 1968.

STATEMENT OF THE FACTS

At the preliminary hearing on October 8, 1969, and at the trial on August 25 and 26, 1969, the Government produced witnesses who testified substantially as follows:

At approximately 5:30 a.m. on the morning of August 23, 1968, Mrs. Thomasine Lewis was asleep in the bedroom of her apartment at 625 K Street, S.E., Washington, D.C. With her in the bed was her fourteen-month-old son. (Tr.6.) Mrs. Lewis was awakened when she felt a man on the bed beside her with his hand inside her undergarments. (Tr.7.) Mrs. Lewis leaped from the bed and screamed "Mike" in order "to make him think there was a man . . . in the house with me." (Tr.7.) At first the man didn't move. (Tr.7,14.) After Mrs. Lewis started screaming, the man leaped from the bed and ran down the hall (Tr. 7,8,17) and out of the apartment building (Tr. 8,9), pushing the sister aside as he fled. (Tr. 8,16,17,24.) Mrs. Lewis and her sister further testified that the man then went back around the building to the bedroom window and peered in at them (Tr. 8,9,18,24) until the sister said "go get the gun," at which point the man ran away down the street. (Tr. 24.)

The man apparently gained access to the bedroom by removing the screen from the window and crawling through the open window. (Tr. 6,13.)

Mrs. Lewis stated that dawn was breaking and that her bathroom light was on, giving enough illumination to her bedroom for her to see the man she discovered in her bed. (Tr.7.) She said that he was in her bedroom for approximately five minutes and that he remained at the bedroom window for "one or two seconds" when he reappeared there. (Tr.9.)

Mrs. Lewis testified that she saw the man again at the Safeway on Seventh Street, Southeast, approximately two weeks thereafter, that she informed an officer who accompanied her on a search for the man, but that they were unable to locate him. (Tr.10.)

Mrs. Lewis finally stated that she saw the man again on October 1, 1968, approximately six weeks after the incident, outside the same Safeway, that she flagged a passing scout car, and that the man was subsequently apprehended in her presence. (Tr. 10,11) Mrs. Lewis identified the man who was arrested, the appellant, as being the same man who was in her apartment on August 23, 1968. (Tr. 11-12.)

Appellant took the stand in his own behalf and admitted that he had been passing 625 K Street, S.E., in the early morning hours of August 23, 1968, on the way home from his

father's house. (Tr. 39,40,43.) He stated that he heard a woman or several women screaming, that he looked through the window to investigate, and that he then continued his journey home. (Tr. 39-42.)

The primary characteristics by which Mrs. Lewis recognized the man who had entered her bedroom were his tennis shoes and "bush" style haircut. (Tr.9.) Appellant was aware of his identification based on his hair style. On direct examination he stated:

> Q. What happened when you saw her around at the Safeway?
>
> A. She told the police on me.
>
> Q. What did she tell the police on you?
>
> A. That I had an African bush and that I had been in her apartment. And I wasn't in her apartment.
>
> Q. Did you have an African bush at the time that she told the police this?
>
> A. Yes, sir.

(Tr. 41.)

ARGUMENT

I. IT WAS ERROR FOR THE TRIAL COURT TO DENY THE MOTION FOR DIRECTED VERDICT ON COUNT TWO, ASSAULT WITH INTENT TO COMMIT RAPE, WHEN THE GOVERNMENT HAD OFFERED NO EVIDENCE GOING TO PROVE AN ESSENTIAL ELEMENT OF THAT OFFENSE.

[The Court is respectfully requested to review the following transcript pages in connection with the argument on this point: Tr. 30-35.]

It is well established in this Circuit that all elements of the offense charged must be proved by the government, and that failure to offer proof going to all the elements of the crime will result in reversal. In Thweatt v. United States, No. 22,772 (D.C. Cir. June 30, 1970), [1] this court said that "it is . . . fundamental . . . that the government must introduce probative evidence of each and every element of the crime charged . . . . " Slip op. at 10.

---

[1] See also Robinson v. United States, 333 F.2d 323 (8th Cir. 1964); Stevens v. United States, 297 F.2d 664 (10th Cir. 1961); United States v. Wilson, 284 F.2d 407 (4th Cir. 1960); Cartwright v. United States, 146 F.2d 133, 135 (5th Cir. 1944).

The elements which must be proved when assault with intent to commit rape is charged were established in Hammond v. United states, 75 U.S. App. D.C. 397, 398, 127 F.2d 752, 753 (1942), as follows:

> In order to make out a case of assault with intent to commit rape, it is essential that the evidence should show beyond a reasonable doubt (1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female.

(Emphasis added.)

In Baber v. United States, 116 U.S. App. D.C. 358, 324 F.2d 390 (1963), cert. denied, 376 U.S. 972 (1964), the court reversed a case which is strikingly similar to the case at bar precisely because the third element was not proved. In that case the complaining witness was awakened at 2:30 or 3:00 in the morning.

> . . . by something "feeling over" her. She thought it was her child [who was asleep in bed with her], but then she felt her skirt being torn. She saw that a man was leaning over her, and was "scared." She struck him, knocking him down, and then jumped up and turned on the light. She recognized the intruder as the appellant. He had his pants open and his private exposed. She asked him what he was doing in her house, and he ran out through the back door.

116 U.S. App. D.C. at 359,324 F.2d at 391. In reversing his conviction of assault with intent to commit rape, the court noted:

> [E]vidence of "purpose to carry into effect this intent with force and against the consent of the female" was lacking. The intruder made no threats, and in fact said nothing at all. Apart from tearing her skirt, he did not use physical force or violence. When the complaining witness pushed him off and knocked him to the floor, he jumped up and fled. His conduct was such that he might properly have been convicted of some lesser included offense, but we do not think he was properly found guilty of assault with intent to commit rape.

116 U.S. App. D.C. at 360, 324 F.2d at 392; emphasis added.

Baber is obviously dispositive of the case at bar. The factual similarities between the cases are readily apparent. In this case the complaining witness was awakened about 5:30 A.M. when she felt movement in her bed. (Tr.6.) When complainant became aware of the man's presence she "hopped up out of the bed and stood over by the dresser. He just laid down in the bed, didn't move. I ran out the room and hollered, "Mike" to make him think there was a man in the room -- in the house with me. When I hollered, he got up and ran out." (Tr. 7; emphasis added.) Again on cross-examination Mrs. Lewis stated: "I jumped out of the bed and stood by the dresser. He didn't move. I hollered, "Mike," to make him think that someone else was there with me." (Tr. 14, emphasis added.)

By complainant's own testimony it is clear that there was no "purpose to carry into effect this intent with force and against the consent of the female." See Hammond, supra. Indeed a strong argument can be made that even the second element of the offense, "an intent to have carnal knowledge of the female," was not shown in this case. It is clear that speculation and unwarranted inference of intent will not be permitted to make out a case of attempt to commit rape.[2/]

Counsel made a timely demand for a directed verdict on count two at trial. In very clear fashion the argument was made that the government had offered no proof going to the third element of the alleged offense. (Tr. 31.)

2/ See Hammond v. United States, supra, in which the court said:

> In the light of the circumstances we have related, we think it impossible that a jury of reasonable men could have fairly reached the conclusion that appellant, in what he did, necessarily intended to commit rape. True enough, his intent can only be determined by his acts. But on the facts shown here, the conclusion that he intended rape would be pure conjecture. Appellant was himself at the time fully dressed. . . . Except that he used his hand to touch the body of the girl, he did nothing to carry out a carnal purpose. To assume in there circumstances that he intended to [use] force . . . is neither reasonable nor credible. That he had a lustful desire is not enough. There must have been an intent to ravish if the desire were denied. That he was guilty of a serious offense goes without saying . . . but that he was guilty of attempted rape we think may not be inferred from the evidence on which the government relied. (75 U.S. App. D.C. at 398,127 F.2d at 753)

> Mr. NESBITT: Your Honor will note that there are three requirements with regard to assault with intent to commit rape, that the Government must prove in order for the jury to render a verdict.
>
> One of those elements in this case is missing.
>
> THE COURT: What is [t]hat?
> MR. NESBITT: The third element, Your Honor, the element which requires that the person who has . . . committed the assault . . . did so with the intention to use whatever force is necessary to complete the act.

(Tr. 31.) Counsel then went on to demonstrate that the government had offered no evidence whatsoever from which an intent to use force could reasonably be inferred. (Tr. 31.) It is clear from complainant's testimony that the man in her room used no force, that he lay still when she jumped up, and that he ran from the apartment when she screamed. (Tr. 7,14.)

In Baber, supra, this court found insufficient evidence of intent to use force in a case in which (1) the attacker had torn complainant's skirt and (2) had opened his pants and exposed himself. 116 U.S. App. D.C. at 359; 324 F.2d at 391. Surely an even stronger case for granting a directed verdict is made out in this case where the attacker (1) used no force at all, only touching complainant once, and (2) where the only evidence indicating even an intent to proceed to sexual intercourse was complainant's statement

that "when he was in the bed he had his pants 'unzippen' [sic] and his button loose." (Tr. 8.)

Appellant's knowledgeable trial counsel attempted to point out the controlling authority to the trial judge, but his effort was spurned:

> If the Government has put on no evidence with regard to the third element in this case, then this particular charge can not effectively be presented to the jury.
>
> I am not arguing with the Court that what he did was right.
>
> As a matter of fact, there are two cases in point, if I am not mistaken; one being very close to this case.
>
> THE COURT: What is it?
> MR. NESBITT: Your Honor, I do not have it here now. I will have it here after lunch.
> THE COURT: After lunch will be way too late.

(Tr. 32.) Counsel obviously had the Baber and Hammond cases in mind. It is equally obvious that he was correct in his assertion that binding precedent in this Circuit dictated that the trial judge grant the motion for a directed verdict. Unfortunately, the trial judge did not allow him to produce the relevant cases. This Court must therefore reverse to correct this obvious and grievous error.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE GOVERNMENT TO OFFER INFORMATION CONCERNING A PRIOR CONVICTION WHEN THE PREJUDICE RESULTING THEREFROM CLEARLY OUTWEIGHED ANY BENEFIT THE GOVERNMENT MIGHT HAVE RECEIVED THEREFROM.

[The Court is respectfully requested to review the following transcript pages in connection with the argument on this point: Tr. 36-38, 46-47, Supp. Tr. 17-18.]

Trial counsel made a proper and timely request that the trial judge exercise sound discretion in excluding from the trial prejudicial evidence relating to appellant's prior criminal record; this request was made under the Luck [3/] - Gordon [4/] line of cases. This court is all too familiar with the arguments made under those cases; this brief will not burden the court with well-known arguments, but rather a direct approach to how the Luck - Gordon discretion was abused will be made.

The general "rule of thumb" set forth in Gordon is that "convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . . ." 127 U.S. App. D.C. at 347, 383 F.2d at 940. This court recently said by way of dictum that:

3/ Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

4/ Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), cert. denied, 390 U.S. 1029 (1968).

> A man who steals is not necessarily a man who lies. A conviction for housebreaking, unlike one for perjury or false pretenses, sheds little light on the likelihood that the accused has lied on the stand.

United States v. McCord, ___U.S. App. D.C. __ , __ , 420 F.2d 255,257 (1969.)

The prior convictions in this case were:

> May, 1962 - carrying a dangerous weapon; simple assault
> January, 1964 - robbery
> March, 1965 - simple assault
> October, 1966 - attempted housebreaking

(Tr. 37.) It is conceded that the trial judge did not abuse his discretion in allowing one prior conviction out of four, if that one conviction goes to credibility. The plain and simple fact is, as this court has said, that a man who steals doesn't necessarily lie, and it is infinitely more prejudicial for the accused to take the stand and have evidence of his prior convictions introduced than it is useful to the government's case to introduce that evidence "for impeachment of credibility."

The defendant in this case took the stand, even though he knew that evidence of his record would be introduced. He had no choice. His only hope of extricating himself from almost certain conviction was to take the stand and explain why the victim and her sister saw him near their apartment at 5:30 in the morning. He made that explanation. The

government will no doubt characterize that explanation as inherently incredible. The truth often is. Yet it is for a jury of the defendant's peers to judge the truth or falsehood of that statement, absent such obviously inflamatory and irrelevant information as that going to prior convictions for "violent or assaultive crimes," which the court has recognized to be nonprobative of credibility.

It is time for this court to go the final step along the journey which was started in Luck-Gordon, Granted the court is faced with a statutory provision, 14 D.C. Code §305 (1967), which allows introduction of prior convictions. However, in the recent cases of United States v. Bailey and United States v. Burgess, ___U.S. App. D.C. ___, 426 F.2d 1236 (1970), Circuit Judge Fahy made a strong and cogent argument that Section 305 may well be unconstitutional. With Circuit Judges Tamm and MacKinnon dissenting, Judge Fahy, after determining that Spencer v. Texas [5/] is not a bar to such consideration, noted that the question is

> [W]hether in the exercise of our supervisory power over the administration of criminal justice in this jurisdiction our court should restrict the present scope of the rule as suggested, for

---

[5/] 385 U.S. 554 (1967).

> example, by the American Law Institute or the Commission on Uniform State Laws . . . . The deep involvement of our court as a whole in the problem would require the exercise of this supervisory power if at all to be undertaken en banc.

___ U.S. App. D.C. at ___, 426 F.2d at 1242-43.

We strongly urge the court to consider Judge Fahy's opinion in Bailey and Burgess and to call for en banc consideration of this difficult problem. In that context the court could go the final step, if not declaring the section unconstitutional, then at least restricting the kind of convictions allowed to those which go to veracity.

The present case offers a perfect example of a situation in which the prior conviction was carefully used to have the maximum prejudicial effect. At the conclusion of his cross-examination the Assistant U.S. Attorney questioned appellant as follows:

> Q. Mr. Carter, in October, 1966, were you convicted of attempted housebreaking?
>
> A. I was framed for that.
>
> Q. Pardon me?
>
> A. I got framed for that.
>
> Q. Were you convicted, sir?
>
> A. I got framed for it because I had an African bush.
>
> Q. Were you convicted, sir?
>
> A. Yes, sir.
>
> [THE PROSECUTOR]: I have no further questions.

(Tr. 46-47.) Thus with no explanation and at the end of the examination, and therefore as the last thing in the jurors' minds, the court allowed highly prejudicial information to be introduced which cannot in any way be considered to go to the defendant's veracity. We all know the purpose for which such information is introduced. It is respectfully suggested that the court stop giving its sanction to the legal fiction that such information is used only for impeachment of credibility.

In this case the court would not even have recited the admonition to the jury that the information be used by them only for impeachment (a practical impossibility) had it not been for the prosecutor's admonition that the instruction be given.[6/] The court gave the instruction as an afterthought. (Supp. Tr. 17-18)

6/ THE COURT: Does the government have any objections or suggestions?
. . . .
[THE PROSECUTOR]: Your Honor, in regard to the instructions on impeachment, proof of prior convictions - -
THE COURT: What is that?
[THE PROSECUTOR]: The instruction on impeachment of witnesses, credibility, proof of prior convictions - -
THE COURT: Oh, yes.
[THE PROSECUTOR]: I believe that that should be given.
(Tr. 56.)

The prejudice to defendant is clear in a situation such as this. It is therefore respectfully requested that the court promulgate a forthright requirement that, if prior convictions are to be introduced at all, only those which have legitimate probative value going directly to credibility will be allowed. It is submitted that the trial judge abused his discretion in allowing the introduction of evidence on a prior conviction for a similar offense which did not go to credibility, and that appellant's convictions on both counts should be reversed in this case because of the prejudicial use of information regarding the 1966 conviction.

III. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO ALTER OR EXPLAIN ITS CHARGE ON COUNT TWO, ASSAULT WITH INTENT TO COMMIT RAPE, WHEN ITS INSTRUCTION FAILED TO CLARIFY ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME.

[The court is respectfully requested to review the following transcript pages in connection with the argument on this point: Supp. Tr. 10-12, 14-15, Tr.60.]

In his charge to the jury the trial judge stated the elements of assault with intent to commit rape to be the following:

> The only two elements which the Government must prove beyond a reasonable doubt in order for you to find the defendant guilty as charged are:
>
> 1. That the defendant assaulted the complainant;

> 2. That he did so with intent to commit rape; that is, with intent to have sexual intercourse with her, forcibly and against her will.
>
> NOW, if you find that the government has proved both of the elements of this offense, as I have defined them to you; that is, the assault and the intent, then you may find the defendant guilty as charged.

(Supp. Tr. 11.) The judge also indicated to the jury the possibility of a lesser included offense of simple assault "if you should find that the Government has proved beyond a reasonable doubt that the defendant assaulted the complainant, but find that the intent to commit rape has not been proved . . . ." (Supp. Tr. 12.)

The elements required for assault with intent to commit rape are discussed in detail under section I, supra. It is quite clear that there are three elements, not two. Those elements, as established in Hammond v. United States, supra, are:

> (1) An assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female.

75 U.S. App. D.C. at 398, 127 F.2d at 753. These elements were not explained to the jury with sufficient clarity to allow them to judge the actions of the accused against the standards which establish guilt. It was error for the trial judge to deny the motion for directed verdict in the first

place. See section I, supra. That error was compounded when the judge failed to clarify his charge even after trial counsel made a clear and specific request that he do so. After the charge was given, counsel approached the bench and the following colloquy took place:

> MR. NESBITT: I have two objections. The first objection is as to the Court's instruction on the elements of proof with regard to the charge of assault with intent to commit rape.
>
> If I understood, the Court gave the standard instruction that there were two elements necessary for proof of assault with intent to commit rape.
>
> My understanding of the law is that there are three. The Government must prove each one of them independently.
>
> One. The Government must prove that there was an assault;
>
> Two. The Government must prove that at the time of the commission of the assault, it was the intent of the party to have carnal knowledge or sexual relations with the person assaulted;
>
> Three: That the party at the time of the commission of the assault and at the time that he had intent to have carnal knowledge or sexual relations with the individual, intended to use whatever force that was necessary to accomplish that.
>
> I don't think that that was fairly defined, against resistance, not sufficient to indicate it is an independent element of the case.

THE COURT: As I see it, I included your last two elements in the second element; that is, to have sexual intercourse forcibly and against her will. I think that that is sufficient, so I won't change that.

The Baber and Hammond cases, supra, make it clear that the absence of the third element will result in a directed verdict on the charge of assault with intent to commit rape. Even if the court rejects that argument in this case, thus agreeing that it was proper to send the case to the jury on that count, it is clear that the charge to the jury should have specifically set out the three elements, noting that the government must prove intent to use whatever force is required to achieve the objective of rape.

That clarification should have been given is illustrated by the confusion which surrounded the jury's announcement of the verdict on the second count:

THE COURT: Now, Mr. Foreman, I said that you had three choices as to a verdict in the second count: One is guilty as charged; the other is guilty of simple assault; the other is not guilty.

Now, what is your verdict? Guilty as charged would be guilty of assault with intent to commit rape; the other would be guilty of simple assault; the other, not guilty.

Now, in view of that, what is your verdict on the second count?

THE FOREMAN: Guilty of simple assault.

THE DEPUTY CLERK: Will the jury panel please rise - -

THE COURT: The jurors seem to look puzzled. Are you sure that you have correctly announced the verdict?

MR. FOREMAN: I am quite sure.

THE COURT: Their possible verdict would be guilty as charged, which would mean guilty of assault with intent to commit rape; the second possible verdict is guilty of simple assault; the third is not guilty.

Now, you say the verdict is what?

THE FOREMAN: The first verdict is guilty as charged.

THE COURT: Guilty as charged to assault with intent to commit rape?

THE FOREMAN: Right.

THE COURT: Now, poll the jury.

(Tr. 60.) The jury was polled and all jurors responded "guilty" to the charge of assault with intent to commit rape. While this situation does not constitute such a coercive encroachment on the free will of the jurors to constitute reversible error, see United States v. Brooks, ___ U.S.App.D.C. ___, 420 F.2d 1350 (1969), it does demonstrate confusion on the part of the jury which may well be evidence of misapplication of the charge. It is submitted that the failure of the trial judge to clarify his charge on count two, after being requested to do so by counsel, presents clear error for which this court must reverse.

IV. IT WAS ERROR FOR THE TRIAL COURT TO REFUSE TO GRANT THE MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT ON COUNT TWO WHEN THE EVIDENCE WAS CLEARLY INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY.

[The Court is respectfully requested to review the following transcript pages in connection with the argument on this point: those pages relevant to sections I and III of this brief, and Tr. 65.]

At the close of the government's case, trial counsel requested a directed verdict on count two. See section I, supra. That motion was denied. After the jury rendered its verdict counsel moved for judgment notwithstanding the verdict on count two. The court denied the motion without further consideration. (Tr. 65.)

We adopt the argument in section I of this brief to support the contention that it was error for the trial court to deny the motion for judgment n.o.v. Even if the court assumes that there was reason to deny the motion for directed verdict at the close of the government's case, it is clear that when all of the evidence was in there was not a scintilla of evidence going to proof of the third element of count two. It is a truism that there cannot be sufficient evidence when there is no evidence. For the reasons previously given, it is respectfully requested that this court reverse the conviction of assault with intent to commit rape.

CONCLUSION

For the reasons set forth above, the convictions herein should be reversed. As to count two the district court should be instructed to enter a judgment of acquittal. As to count one, a new trial should be ordered at which no evidence of appellant's prior convictions will be admitted.

Respectfully submitted,

Lewis A. Rivlin
Attorney for Appellant
Appointed by this Court

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1970, I served the foregoing brief by delivering copies thereof to the office of the United States Attorney, United States Courthouse, Washington, D. C.

Lewis A. Rivlin